NO. 97-1981

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, *et al.*
Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; *et al.*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents restate the Questions Presented as follows:

1. Does the Ex parte Young exception to the Eleventh Amendment give a federal court the power to enjoin a State from collecting taxes from a railroad company under a statute expressly waiving the provisions of the Tax Injunction Act?

2. For purposes of Ex parte Young doctrine, is a federal court awarding prospective or retroactive relief when it enjoins a State from collecting taxes that it has already assessed, but that have never been paid or distributed to local jurisdictions?

PARTIES TO THE PROCEEDINGS

All parties were correctly listed in the Petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation. CSX Transportation, Inc.'s non-wholly owned subsidiaries are:

Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Beaver Street Tower Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Distribution Services, Inc.
Energy Dominion
Gemetal Distribution Services, Inc.
Georgetown Potomac Company
Harbour Associates
Helm-Atlantic Associates, L.P.
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company
Independent Rail Services, Inc.
Indiana Rail Road Company
Lakefront Dock and Railroad Terminal Company
Mahoning State Line Railroad Company
North Charleston Terminal Company
One James Center Associates

Richmond Center Associates
Richmond Center Associates II
Savannah Harbor Resources Developers, LLC
Savannah Harbor Venture Partners, LLC
SHRD, Inc.
Unified Services, Inc.
Washington Harbour Associates Limited Partnership
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company

Nicholas, Fayette & Greenbrier Railroad Company was a corporation which was dissolved on January 2, 1997. Before dissolution it was 50% owned by CSX Transportation, Inc., which is a wholly owned subsidiary of CSX Corporation, and 50% owned by Consolidated Rail Corporation, a wholly-owned subsidiary of Conrail, Inc. On dissolution, the assets were split between the owners in the percentages stated above. Nicholas, Fayette & Greenbrier Railroad Company has no subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-1981

THE BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA, GASTON CAPERTON, Governor; LARRIE BAILEY, State Treasurer; GLEN B. GAINER, III, State Auditor; DARRELL V. McGRAW, JR., Attorney General; GUS DOUGLASS, Commissioner of Agriculture; HANK MAROCKIE, State Superintendent of Schools; and KEN HECHLER, Secretary of State,

Petitioners,

v.

CSX TRANSPORTATION, INCORPORATED; and NICHOLAS, FAYETTE & GREENBRIER RAILROAD COMPANY,

Respondents,

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinions below are adequately identified in the Petition, except that the opinion of the United States District Court for the Southern District of West Virginia, which is reprinted in Appendix B to the Petition, is reported at 997 F.Supp. 749 (S.D.W.V. 1997).

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition, except that the Petition fails to note that the decision of the United States of Appeals for the Fourth Circuit was entered on March 10, 1998.

STATUTORY PROVISION INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. § 11501. *See* Petition, pp.2-3. Sections 306(1)(a) and (b), the specific provisions applicable in this case, prohibit a state, a political subdivision of a state, or any governmental entity or person acting on behalf of such state or subdivision, from assessing, levying, or collecting ad valorem taxes on rail transportation property based on an assessed value that has a higher ratio to the true market value of the rail transportation property than the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. According to Section 306(2)(c), no relief may be granted unless the ratio of assessed value to true market value of the rail transportation property is at least 5% greater than the ratio of assessed value to true market value of other commercial and industrial property.

STATEMENT OF THE CASE

The Respondents amend and expand upon the Petitioners' Statement of the Case as follows.

Respondents CSX Transportation, Inc. and Nicholas, Fayette & Greenbrier Railroad Co. (referred to collectively as

"the Railroads") brought this action to challenge their ad valorem tax assessments for the 1996 tax year in West Virginia, requesting injunctive and declaratory relief pursuant to Sections 306(1)(a) and (b). As defendants, the Railroads named the Board of Public Works of the State of West Virginia and its individual members: Gaston Caperton, III, Governor; Larrie Bailey, State Treasurer; Glen B. Gainer, III, State Auditor; Darrell McGraw, Attorney General; Gus Douglass, Commissioner of Agriculture; Ken Hechler, Secretary of State; and Hank Marockie, State Superintendent of Schools (referred to collectively as "the Board").

The Railroads alleged that the Board assessed their property at a ratio of assessed value to true market value more than five percent greater than the ratio of assessed value to true market value at which other commercial and industrial property was assessed for the 1996 tax year, in violation of Sections 306(1)(a) and (b). The Railroads further alleged that the Board and its members were attempting to collect tax payments from the Railroads in violation of the Act. This was the same type of discriminatory taxation challenged in a previous action filed by the Railroads concerning the 1993 tax year, in which the Fourth Circuit found that the Board had assessed the Railroads discriminatorily. See CSX Transportation, Inc. v. Board of Public Works, 95 F.3d 318 (4th Cir. 1996).

Under West Virginia law, the Board assessed the Railroads' property for ad valorem tax purposes at 60% of its full market value.[1] The Board sent notices of assessment dated December 20, 1995, to the Railroads. Because the

[1] The Railroads did not challenge the Board's valuation of their property in this case.

Railroads did not administratively challenge the values contained in those assessments, the assessments became final in January of 1996.

It is the duty of the State Auditor to collect ad valorem taxes paid by public service companies, including railroads, and then to distribute those taxes to the counties in which the companies have property, with the exception of three-eighths of one percent of the total, which is paid into the state treasury for administrative costs. Therefore, other than the small amount reserved for state administrative costs, all of the tax proceeds at issue in this case are local funds, not state funds.

The first payment of the Railroads' taxes was due by September 1, 1996, the second payment was due by March 1, 1997, and all unpaid taxes became delinquent on April 1, 1997. The Railroads filed this case in October 1996, after they had made the first installment payment of their taxes for the 1996 tax year. In this case, the Railroads requested that the collection of the disputed portion of their taxes, approximately 7% of the total amount due, be enjoined from their second payment.

Because the Railroads' claim in this case was based not on an alleged overassessment of their property, but rather on the underassessment of locally assessed commercial and industrial property in West Virginia, the Railroads were dependent on data in the possession of the West Virginia Department of Tax and Revenue in order to prove their claim. The Department published its own sales assessment ratio study for the 1996 tax year in January of 1997, one full year after the Railroads' assessments became final and three months after the Railroads filed their complaint. At the same time, the Department furnished the Railroads with a data set which enabled the Railroads to make their own analysis of the ratio of assessed

value to true market value for locally assessed commercial and industrial property in West Virginia for the 1996 tax year.

The Railroads' expert statistician analyzed these data and determined that the actual level of assessment of commercial and industrial property in West Virginia for the 1996 tax year was no greater than 56% (which is approximately 7% lower than the Railroads' assessment ratio of 60%). Based on this evidence, the Railroads filed a Motion for Preliminary Injunction in February of 1997 asking the district court to restrain and enjoin the Board and its members from collecting or distributing to local jurisdictions the discriminatory portion of the taxes from the Railroads' second installment payment of their 1996 taxes, which was due in March. The timing of the motion was governed by the Railroads' receipt of the necessary data in February.

The Board filed a Motion for Summary Judgment (which the court and the parties agreed should be denominated a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure), which the district court granted on February 25, 1997. The court held that, under the decision of this Court in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), Congress did not have the power to abrogate Eleventh Amendment immunity in Section 306, because Section 306 had been enacted pursuant to the Commerce Clause rather than § 5 of the Fourteenth Amendment. In addition, the district court ruled that the Railroads were not entitled to prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). This ruling was based on the finality of the Railroads' assessments, even though the state officials named as defendants had not yet collected or distributed to local jurisdictions the Railroads' second tax payment. The district court dismissed the case and denied the Railroads' motion for preliminary injunction as moot. The district court also rejected

the Railroads' claim that they could cure any alleged jurisdictional defect by amending their complaint to name the counties as defendants.

The Fourth Circuit reversed this decision, holding that because the action the Railroads sought to enjoin -- the collection of illegal taxes -- has not yet occurred, the injunction sought by the Railroads was precisely the type of relief contemplated by *Ex parte Young*. Appendix A to the Petition, pp. A-14-15. The Fourth Circuit further held, in agreement with the arguments made by the United States as intervenor, that because full relief could be granted to the Railroads under *Ex parte Young*, there was no need to decide whether the abrogation of state sovereign immunity in Section 306 was constitutionally valid.

The Railroads have not yet paid the disputed portion of the taxes at issue in this case.[2] According to West Virginia law, the State Auditor is required to certify to the Board and the counties the amounts of any delinquent taxes of public service corporations. It is then the duty of the Attorney General to collect any delinquent taxes. Therefore, even though almost all of the tax dollars at issue in this case are local funds, it is state officers who collect and distribute those funds.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. The Railroads respectfully submit that this Petition should be denied.

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[2] They paid the remainder of their second installment by March 1, 1997, withholding only the discriminatory portion, 7% of the total.

1. No Special or Important Reasons Exist for Granting the Writ

a. The Board's Comity Argument Has No Legal Basis

The Board makes two arguments why this Court should accept this case and reverse the ruling of the United States Court of Appeals for the Fourth Circuit, neither of which raise any serious or important issues. The first argument, which is based on notions of comity, is being presented here for the first time, without either of the courts below having had an opportunity to address it. As this Court has repeatedly held, "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Department of Corrections v. Yeskey*, _ U.S. _, 66 USLW 4481, 4483 (1998), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

In *Yeskey*, the newly raised issue went to the heart of subject matter jurisdiction: whether application of the Americans with Disabilities Act of 1990 to state prisons was a constitutional exercise of Congress' power under either the Commerce Clause or § 5 of the Fourteenth Amendment. In contrast, the argument made by the Board here rests on the doctrine of comity, which is not truly a jurisdictional issue at all. This case does not present any compelling reason for this Court to overcome its traditional reluctance to address newly raised issues that were not considered by the Court of Appeals.

In addition, the Board's argument depends in its entirety on ignoring the express terms of Section 306, as well as a directly relevant decision in which this Court already rejected the same

argument being made here.[3] According to the Board, *Ex parte Young* relief cannot be used to enjoin state officers from collecting state taxes because of the prohibition of the Tax Injunction Act, 28 U.S.C. § 1341. It is astonishing that the Board can make this argument without ever mentioning that Section 306 contains an express waiver of 28 U.S.C. § 1341. Section 306(2) [49 U.S.C. § 11501(c)] states that relief may be granted under Section 306 "*notwithstanding section 1341 of title 28* and without regard to the amount in controversy or citizenship of the parties." [Emphasis added]. Although this subsection is quoted in the initial pages of the Petition, that language is completely ignored in the Board's argument. The Board makes its entire argument without mentioning the one provision of the statute that is directly relevant (and contrary) to its argument.

The Board also fails to note that this Court has previously heard and decided this precise issue. In *Burlington Northern*, this Court unanimously rejected the same argument made by tax officials from the State of Oklahoma:

> Respondents contend that injunctive relief against state taxation offends the principles of comity. [Citation omitted.] The Court of Appeals found that its restrictions on valuation actions under § [11501] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delay of the state tax collection process." [Citation omitted.] These are policy considerations which may have weighed heavily with legislators who considered the Act and

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[3] *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987) ("*Burlington Northern*").

> its predecessors. It should go without saying that we are not free to reconsider them now.

481 U.S. at 464.

Because it completely ignores the relevant statutory language, the Board's comity argument is phrased in terms of judicial action rather than legislation action. According to the Board, this Court should accept this case in order to make sure that state tax collection "is not federalized by judicial fiat." Petition, p. 9.[4] In fact, the Petition reads as if there were no statute involved in this case at all. No one in this case, however, has ever challenged the validity of the substantive provisions of Section 306. The Board's comity argument therefore depends on disregarding the actual terms of Section 306, disregarding the policy decisions made by Congress in enacting Section 306, and disregarding a directly relevant decision of this Court interpreting Section 306. Because the argument has no basis in the law, it cannot present a serious or important issue which this Court needs to address.

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[4] The only plausible explanation for the Board's comity argument is that the Board may have confused the Tax Injunction Act with the Eleventh Amendment. According to the Board, "the Fourth Circuit assumed that the 4-R Act's abrogation was invalid in order to reach the *Ex parte Young* issue. Thus, the question here is the scope of federal courts' authority in the absence of the 4-R Act's abrogation of Eleventh Amendment immunity." Petition, pp. 9-10, n. 4. What the Fourth Circuit actually said was that it did not need to determine the Fourteenth Amendment issue "because *even assuming* that section 306 cannot be justified as an exercise of Section Five of the Fourteenth Amendment and therefore its purported abrogation of state sovereign immunity is invalid, *Ex parte Young* authorizes an injunction, without eliminating sovereign immunity, that will provide the railroads with complete relief." Appendix to Petition, p. A-7 [emphasis added]. The Fourth Circuit thus took the sovereign immunity issue out of the case, but said nothing that would imply that Section 306's waiver of the Tax Injunction Act was invalid.

b. The Relief Requested by the Railroads in This Case is Precisely the Type of Relief Contemplated by *Ex parte Young*

The Board's second argument simply complains that the Fourth Circuit misapplied the doctrine of *Ex parte Young*, and turns on factual arguments concerning where the line should be drawn between prospective and retroactive relief. At most, the Board argues that the Fourth Circuit misapplied a properly stated rule of law, which is insufficient grounds for granting a Petition under Rule 10.

According to the Board, the Fourth Circuit's decision "effectively provides *declaratory monetary* relief against the State." Petition, p. 10 [emphasis in original]. This argument implies two things that are untrue: first, that the Railroads are seeking a refund of taxes already paid; and second, that the tax funds involved are state funds, rather than local funds. The Fourth Circuit quite properly rejected the Board's tortuous arguments attempting to transform local funds into state funds and to transform an injunction against future collection of taxes that have not been paid into a refund from the state treasury.

The Board attempts to turn this simple issue into one of special importance by claiming that the Fourth Circuit's decision has improperly expanded the scope of the *Ex parte Young* doctrine. This is nonsense, however. As the Fourth Circuit pointed out, the Railroads have the money at issue in this case in their own pockets, and the Board wants to collect it from them. The Railroads have asked for an injunction to prevent this from happening because

it would violate federal law. This is about as straightforward an application of *Ex parte Young* as can be imagined.

It is also a straightforward application of Section 306, which calls for injunctive relief against the assessment, levy *or collection* of taxes that discriminate against railroads. In West Virginia, members of the Board are bound by state law to collect these taxes from the Railroads, and to distribute them to local jurisdictions. The Railroads have asked for a prospective injunction against that collection. This is precisely the type of relief contemplated by Section 306, as well as by the doctrine of *Ex parte Young*. There is no overreaching or expansion of remedies being sought in this case, as the Fourth Circuit recognized. Because the Fourth Circuit's decision does nothing to expand or modify the *Ex parte Young* doctrine, there is no compelling reason for this Court to review this case.

2. There is No Conflict in the Circuits

The Board has not even attempted to argue that there is a conflict in this case, because there is none. The same issues presented to the Fourth Circuit in this case, however, have also been brought before the United States Courts of Appeals for the Third and Ninth Circuits. *See*, *Oregon Short Line R.R. Co. v. Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998); *Wheeling & Lake Erie Ry. Co. v. Public Utility Commission*, 141 F.3d 88 (3d Cir. 1998) (petition for rehearing pending). In those cases, unlike in the case below, the courts chose to address the issue of whether the abrogation of state sovereign immunity in Section 306 was a proper exercise of congressional authority under § 5 of the Fourteenth

Amendment. In both cases, the courts held that Congress did properly abrogate state sovereign immunity in Section 306. Therefore, not only is there no conflict between the Fourth Circuit and the other circuits, but the other courts that have ruled on this issue have actually gone further than the Fourth Circuit did in this case. There is simply no reason why this Court should accept this case or address these issues at this time.

CONCLUSION

Neither issue raised in the Petition merits review by this Court. The comity issue is raised here for the first time, and rests entirely on a misreading of Section 306. The second issue is simply a factual argument over how to apply the *Ex parte Young* doctrine. The Fourth Circuit's decision on this point did nothing to expand or modify the doctrine, and therefore presents no new controversy for this Court to consider. The Petition does not present any ground for granting certiorari within the meaning of Rule 10 of this Court and should be denied.

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August 7, 1998